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IN THE

SUPREME COURT OF THE UNITED STATES

Spring Term 1969

No. 227

CITY OF AUDUBON PARK, KENTUCKY, and
BOARD OF TRUSTEES, GEORGE W. STEBBINS, H. PATTERSON POPE, MRS. CLARENCE L. HENDERSON, THEODORE H. AMSHOFF and DR. BURTON M. HEINE, - - - - - Petitioners,

versus

AMERICAN AIRLINES, INC.,
DELTA AIR LINES, INC.,
EASTERN AIR LINES, INC., and
TRANS WORLD AIRLINES, INC., - Respondents.

Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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v.

AMERICAN AIRLINES, INC.,
DELTA AIR LINES, INC.,
EASTERN AIR LINES, INC., and
TRANS WORLD AIRLINES, INC., - *Respondents.*

Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Petitioner, City of Audubon Park, Kentucky, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on March 14, 1969.

CITATIONS TO OPINIONS BELOW.

There was no opinion rendered by the District Court. Findings of Fact and Conclusions of Law are printed in Appendix "R" 54a-62a.* The judgment of the District Court is unreported and is printed in full in Appendix "A" hereto, *infra,* Appendix "A" 21-23. There was no opinion of the Circuit Court of Appeals for the Sixth Circuit. An Order was entered by the Court on March 14, 1969 affirming the judgment of the District Court and said Order appears in the certified Record on Petition for Writ of Certiorari and is printed in Appendix "A" hereto, *infra,* App. "A" 23-25. Said Order is not reported.

JURISDICTION.

The Judgment of the Circuit Court of Appeals was entered on March 14, 1969, *infra,* App. "A" 23-25. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED.

1. Were factual issues adequately developed and summary judgment proper?

2. Does the City of Audubon Park, Kentucky, have any police power for protection of health, safety

*Reference to pages of record certified to this Court by the Clerk, United States Court of Appeals for the Sixth Circuit, will be to the Appendix of Petitioner filed in said Court and will be designated by "R" followed by the appropriate page numbers in said Appendix.

and welfare of its inhabitants relative to air flights over its boundaries or has all such power been vested in or preempted by the F.A.A.?

3. If the F.A.A. has failed to establish any health, safety or welfare standards relative to flights over the City, is the City entitled to no judicial relief?

4. If the F.A.A. has established inadequate standards is the City entitled to no judicial relief?

5. If the F.A.A. has arbitrarily failed to establish standards in this instance comparable to those established in similar operations is the City entitled to no judicial relief?

6. In a declaratory action should a complete declaration of all rights be made?

7. Does the City have the right to raise the issue of illegality (and voidness of authority) of present air-flight operations over the City from a taking of property without compensation standpoint on behalf of the residents of the City (Trustees are also individually residents of City.)?

8. Does the City have the right to raise the issue of illegality (and voidness of authority) of present air-flight operations over the City from a taking of property without compensation standpoint on its own behalf as to property (Parks, Roads) actually owned by the City?

9. Was the City of Audubon Park, Kentucky attempting by its legislative enactment to regulate interstate commerce or to protect the health and safety of its inhabitants?

10. Does Federal preemption of air transportation field carry with it a preemption of local police powers relative to the health and safety of the local community?

STATUTE INVOLVED.

The statute involved is 49 *U.S.C.* Section 1301, *et seq.*

STATEMENT OF THE CASE.

As a summary judgment was entered at a very early stage, there is a dearth of factual matter contained in the record. Actually the entire record is based upon pleadings and the two affidavits of Mr. Hedges and Mr. Julliard.

Basically the controversy arose out of the following factual situation, low and continuous flights of aircraft over the City of Audubon Park with increasing frequency and attendant health and safety hazards. The City of Audubon Park was established in 1908 and Standiford Field came into existence in the 1940's. These two entities are probably less than one mile apart. The Board of Trustees of the City of Audubon Park have had various meetings with the Standiford Field authorities but apart from wining and dining, inspections and some promised relief, no results have been accomplished. The residents as well as the Board of Trustees of the City of Audubon Park have believed that the health, safety and welfare of the inhabitants of the City were being seriously jeopardized. Accordingly after over one year of intensive study and

meeting with Air Board authorities, it was deemed necessary by the Board of Trustees of the City of Audubon Park that an ordinance to secure the health, safety and welfare of the residents was the only available means of securing such relief. Accordingly the ordinance in question (Ordinance No. 4, Series 1967, Exhibit B) was adopted and became effective on November 21, 1967. This ordinance with certain exceptions provided that it shall be unlawful to operate aircraft over the City of Audubon Park at a height of less than 750 feet.

The Respondents instituted a declaratory action seeking to adjudge this ordinance void, arguing that under Federal Aviation Administration (hereinafter referred to as F.A.A.) regulations they have the right to fly aircraft over the furthermost part of Audubon Park at levels of 145 feet and at the City's boundaries closest to the airport at 84 feet. Petitioners will offer proof that flights are regularly made at altitudes lower than these. Respondents claim to have a right to fly at this level under F.A.A. regulations which they say have granted them a "flight easement" for these purposes and at these levels. Petitioners contend that the health and safety of the inhabitants are in dire jeopardy (there is no proof to the contrary); that no precautions have been established by the F.A.A. in regard to flights over the City of Audubon Park as have been done in similar locales elsewhere; that in effect there are no safety or health regulations in effect for the City of Audubon Park; that erroneous and inapplicable regulations are sought to be applied;

that any preemption as to air transportation does not carry with it a preemption of local health and safety standards and also that the alleged air easement is void in that such constitutes a taking of property without compensation.

REASONS FOR GRANTING THE WRIT.

Conflict between air and ground rights are continuing to become more acute and numerous. Health and safety measures are basically the function of the local governmental unit. A definite determination of local governmental units' obligations to its inhabitants should be declared and extent of preemption of 49 *U.S.C.* §1301, *et seq.* made known. Specifically question of whether 49 *U.S.C.* §1301, *et seq.* divests local governmental unit of all health and safety powers and leaves such body for practical purposes judicially defenseless should be clearly determined.

ARGUMENT.

I.

Summary Judgment Improperly Entered.

The Petitioners (hereinafter referred to as City of Audubon Park) are not interested in a reversal for reversal's sake, but actually are primarily interested in relief sought under points relating to their substantive rights. However, we can never get to substantive rights if an improper summary judgment is entered. To take this first question first, it is believed that the factual issues have not been developed to the

extent required by our judicial rules for the entry of a summary judgment. The issues were not, as is so frequently expressed, "ripe" for such determination on the record before the Court. There are factual issues which are tied in with other demands for relief also discussed under Point II but it seems that even without the later tie-in points hereinafter raised, the summary judgment is improper. This is for the obvious reasons that the factual issues have not been even dimly developed, the present decision being based solely upon affidavits of Mr. Julliard and Mr. Hedges.

The rule relative to summary judgment is generally stated along the lines that the moving party cannot succeed unless the facts conceded show a right of judgment with such clarity as to leave no room for controversy, and show effectively that the adverse party cannot prevail under any circumstances.

The rule is stated in 49 *CJS* §386 *Judgment,* p. 3219 as follows:

> "The power given to grant a summary judgment must be exercised with care, and not extended beyond its just limits, and before a party is entitled to the benefit of such a statutory remedy, he should bring himself squarely within the spirit and letter of the statute, and everything pertaining to the entry of such a judgment must be done strictly according to the provisions which authorize it. The remedy is to be administered in the furtherance of justice."

A recent case from this Circuit again stating these principles is *Rogers* v. *Peabody Coal Co.,* CA 6, 342 F. 2d 749.

The case of *F.A.R. Liquidating Corp.* v. *Brownell,* CA 3, 209 F. 2d 375 brings out the point that Affidavits filed in support of a motion for summary judgment may be considered for purposes of ascertaining whether an issue of fact is presented, but cannot be used as a basis for deciding the fact issue.

The Court in *Palmer* v. *Chamberlin,* CA 5, 191 F. 2d 532, held that it should refuse to grant a summary judgment where the decision of the question of law depends upon an inquiry into the surrounding facts and circumstances, until the facts and circumstances have been sufficiently developed to give certainty to the Court of its correct determination of the question of law.

The Supreme Court in *Free* v. *Bland,* 369 U. S. 663, 82 S. Ct. 1089, 8 L. Ed. 2d 180 states:

> "Allegations which in some circumstances might have a bearing on the subject were controverted and therefore can only be resolved by a trial on the merits."

and in *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U. S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458:

> "This rule (56(c)) authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is . . . (and where) no genuine issue remained for trial . . . (for) the purpose of the rule is not to cut litigants off from their rights to trial by jury if they really have issues to try'."

Presently the record as to factual matters contains only the affidavits of the two men which contain generalized and evidently hoped for self-serving statements many of which would be excluded as irrelevant to the issues raised in this action. In addition there has been no opportunity to present contrary proof or the usual right of cross-examination.

There is no question that the record other than by pleadings is without evidence relative to the following basic facts: (a) The actual height of flights over the City of Audubon Park, (b) Noise involved, (c) Smoke and gaseous fumes involved, (d) Safety of inhabitants of the City of Audubon Park, (e) Health of said inhabitants, (f) General welfare of said inhabitants, (g) Protective measures relative to foregoing, (h) Adequacy of such protective measures, (j) Reasonableness of protective measures sought to be taken by City of Audubon Park.

City of Audubon Park contends that summary judgment is improper without inquiry and evidence as to each and all of these matters and judicial determination relative thereto. Authorities which we have cited *supra* are believed to be determinative on this point that summary judgment on this record was erroneously entered.

II.

Failure of the Lower Courts to Make a Complete Declaration on Issues Raised By City of Audubon Park in Its Counter Declaration Was Error.

Not only did we fail to have in the lower Courts factual inquiry into the Respondents' assertions contained in pleadings and the affidavits of the two affiants, but there was also a failure to inquire completely into the legality of and necessity for the protective ordinance in furtherance of such matters as the health, safety, and general welfare of the inhabitants of the local governmental unit. The record is devoid of any evidence on the part of Petitioners of the effect of the present flight patterns on the health and safety of the inhabitants of the City of Audubon Park.

It was specifically requested that the City's rights in this regard for the protection of its inhabitants be determined. At least we would have a complete adjudication had it not been summarily decided and findings made by the lower court relative to the rights of the City of Audubon Park as to the (a) height which aircraft may fly over this City, (b) the amount of smoke which may be emitted by such aircraft, (c) the amount of noise which may be created by such aircraft, (d) the effect upon the health of the inhabitants of the City, (e) the effect upon the safety on the inhabitants of the City, and (f) the effect upon the general welfare of the inhabitants of the City. These are all of vital consequence but yet the present record is devoid of any judgment or finding relative to the City's rights and duties in these matters.

The only authorities relied upon by the Court were the New York City cases* and an examination of these authorities show that there were many of the protective standards established and referred to in these decisions which are absent in this case and presently sought by the City of Audubon Park. For example, (1) noise standards were established and take-offs monitored to assure compliance, (2) preferential runway flights could not be made at low altitudes minimum of system established, (3) large aircraft prohibited from entering airport area at less than 1500 feet, (4) flights over the Village of Cedarhurst must be above 1000 feet—under unusual conditions might fly at height of 500 feet or 450 feet but never below 450 feet, (5) no flight over area between 10:00 P.M. and 7:00 A.M., except under emergency conditions. It was specifically pointed out in the City of Audubon Park Answer and Counter Declaration, paragraph 2, subparagraph 3, that a declaration was asked as to what, if any, standards must first be imposed by the Federal Aviation Administration for the protection of the health and safety for the inhabitants of the City of Audubon

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*American Airlines, Inc., et al. v. Town of Hempstead, et al., 272 F. Supp. 226 (June 15, 1966):

All American Airways, Inc., et al. v. Village of Cedarhurst, et al., 106 F. Supp. 521 (July 1, 1952);

All American Airways, Inc., et al. v. Village of Cedarhurst, et al., 201 F. 2d 273 (C.A. 2d, Jan. 7, 1953);

All American Airways, Inc., et al. v. Village of Cedarhurst, et al., 111 F. Supp. 677 (Apr. 10, 1953);

All American Airways, Inc., et al. v. Elderd, Mayor, et al., 209 F. 2d 247 (C.A. 2d, Jan. 4, 1954);

Allegheny Airlines, Inc., et al. v. Village of Cedarhurst, et al., 132 F. Supp. 871 (June 27, 1955);

Allegheny Airlines, Inc., et al. v. Village of Cedarhurst, et al., 238 F. 2d 812 (C.A. 2d, Dec. 13, 1956).

Park prior to a judicial determination of the invalidity of this or a similar ordinance for the health, safety and general welfare of the inhabitants of the City of Audubon Park. This requested declaration remains unanswered. Proof of the City of Audubon Park would be to the effect that none of the precautionary protections established in the New York City cases are present in this instance, and that the health, safety and welfare of the residents is in jeopardy.

Assuming that the Federal Aviation Administration has preempted the field and that they have complete dominion and control as to how high the planes must fly, the amount of noise they may make, the smoke they may emit, the effect that they may have upon the health of the inhabitants of the City of Audubon Park, complete jurisdiction as to the safety of the inhabitants of the City of Audubon Park and complete jurisdiction as to the general welfare of the citizens of Audubon Park, does such preemption if it is not exercised or arbitrarily exercised, deprive the City of Audubon Park from acting on failure of the preempting authority to act. Further does it bar inquiry into the complete lack of establishment of protective standards established in the New York City cases, or the arbitrary refusal to establish any standards.

The Board of Trustees of the City of Audubon Park has by ordinance attempted to protect the safety and health of its citizens. There has been no showing that such is not urgently needed. The District Court's failure to determine these issues is a violation and disregard of the constitutional safeguards vested in

the City of Audubon Park. These are basic issues which cannot be legally ignored.

There is no question but what a complete declaration of rights was not had in the lower Courts. This is normally a requisite to the giving of declaratory relief, for example, in a declaratory judgment action the Supreme Court in *Public Service Commission of Utah, et al.* v. *Wycoff Co., Inc.*, 344 U.S. 237, 73 S. Ct. 236, 96 L. Ed. 1368 states:

> "Of course, the remedy is not to be withheld because it necessitates weighing conflicting evidence or deciding issues of fact as well as law . . . But when the request is not for ultimate determination of rights but for preliminary findings and conclusions intended to fortify the litigant against future regulation, it would be a rare case in which the relief should be granted."

§12 of *Uniform Act:*

> "This act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and to be liberally construed and administered."

Anderson Actions for Declaratory Judgments, Vol. I, page 520, §232:

> "The equitable rule, that when the party comes into a Court of Chancery pleading facts that would entitle him to some equitable relief, the court will assume jurisdiction of the entire controversy and

grant all of the relief which the proof warrants, though it may not be the same prayed for. This is particularly applicable to declaratory actions."

A complete or effective judgment must be entered. *Alabama State Federation of Labor, et al.* v. *McAdory, et al.*, 325 U. S. 450, 89 L. Ed. 1725, 65 S. Ct. 1384, 462 states:

"The declaratory judgment procedure may be resolved to only the sound discretion of the Court and where interests of justice will be advanced and an adequate and effective judgment may be rendered."

It is submitted that neither an adequate or effective judgment has been rendered in this action at the present time.

III.

The City of Audubon Park Has the Right to Raise the Issue of Illegality of Present Operations Over the City of Audubon Park From a Taking of Property Without Compensation Standpoint and to Raise Such Issue Both on the Behalf of Individual Residents and on Behalf of the City Itself as to Property Actually Owned (Park Property, Roads) By the City of Audubon Park.

The City of Audubon Park in its Amendment to Answer and Counter Declaration, filed February 27, 1968 (Appendix "R" 44a-45a), denied that the alleged preemption of navigable air space is a lawful enactment in that the navigable air space designated and sought to be used by Respondents has not been acquired under the mandatory requirements of the *Constitution*

of the United States, Amendment 5, providing, "nor shall private property be taken for public use without just compensation" and *Amendment 14,* §1, and likewise in contravention of the *Constitution of the Commonwealth of Kentucky,* §1, sub-section 5, §13 and §242.

In effect this argument boils down to the question of Respondents' contention that they are using a designated flight easement under authority of the Act of Congress, 49 *U.S.C.* §1301 *et seq.,* ceding jurisdiction to the F.A.A. and under the F.A.A. regulations. The City of Audubon Park is not disputing the statutory authority vested in the F.A.A. nor the right of the F.A.A. to issue regulations (under this Point III, arbitrary failure to establish proper safeguards is an issue under Point II), but the City of Audubon Park does contend that there is no provision in this legislation 49 *U.S.C.* §1301 *et seq.* which permits acquiring aviation easements without payment therefor. If such payment has not been made as is the fact in this case, then the F.A.A. promulgation of easement rights are contrary to the Constitution and hence invalid. In other words there is no real validity as to these regulations and as to the flight pattern easement, for such easement is actually non-existent until acquired in a lawful manner which is not the fact of this case.

The flight pattern easement has not been acquired in accordance with Constitutional requirements and is hence a nullity. This is certainly not firm ground from which to assail the ordinance. Further such protective measures as contained in the ordinance should be a must for any local governmental unit for they are

primarily invested with the protection of the health, safety and general welfare of their inhabitants. If a preemption of such basic protective rights is attempted, such preemption must be legally substantiated and in accordance with Constitutional provisions. If not in accordance with Constitutional provisions, the protection of these basic rights of the citizens remain vested in the local governing body where it originally lay. If this be true, there is no question but what Ordinance No. 4, Series 1967, is a valid enactment and is presently being violated.

In presenting this point before the Honorable Henry Brooks, District Judge, Judge Brooks stated that he was agreeing with the writer and that there was no doubt that individuals would have the right to raise this question and should be compensated for their loss of property rights taken but that he did not believe that this question could be raised on the individual's behalf by the City of Audubon Park. We believe this ruling to be error in two respects, first, that it could not be raised by the City of Audubon Park on behalf of its citizens. This issue should be a must for any local governmental unit for they are primarily vested with the protection of health, safety and welfare of their inhabitants. If a preemption has occurred which would divest them of this responsibility then this preemption must be solidly based and in accordance with Constitutional provisions. If not, such is a nullity and the basic protection of the inhabitants is vested in the local governmental unit where it originally lay. If this be true there is no question

but what Ordinance No. 4, Series 1967 is a valid enactment and is presently being violated.

It is believed that the immediately preceding argument is all inclusive and needs no further elaboration. However, there is an additional and indisputable reason for permitting the City of Audubon Park to raise this issue. The City of Audubon Park is the owner of park property directly in this alleged flight pattern easement as well as roadway property. There is no question that compensation must be paid a municipality for the taking of property as well as individual owners. *City of Louisville* v. *President and Trustees of the University of Louisville,* Ky., 15 B. Mon. 642, 675 (1855):

29 *C.J.S.* 868 §196 states:

> "Where the statute requires a corporation condemning land to make compensation to all persons, the state has the same right to compensation as an individual, although it is not specifically mentioned in the statute."

Nichols Eminent Domain, Vol. 2, page 345, §5.9:

> "Over the property which a municipal corporation acquires as an agency of the state for the performance of the strictly public duties devolved upon it by law, the legislature may exercise a control to the extent of requiring the municipal corporation, without receiving compensation therefor, to transfer such property to some other agency of the government to be devoted to similar public uses or to other strictly public purposes. The property acquired by a municipal corporation for

the private benefit of their inhabitants is protected by the constitution and can be taken only by eminent domain and upon payment of its value.

"Where municipal property is taken in eminent domain by the federal government or some agency, private or otherwise, to which the federal power has been delegated, compensation must be paid whether the property is held in a governmental or proprietary capacity. In this respect the rule is the same as in the case of a federal acquisition of state property."

We believe the question of compensation being a must in this factual situation has been unequivocally determined. *United States* v. *Causby,* 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1945); *Griggs* v. *Allegheny County,* 369 U. S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962). State Court decisions are to the same effect. *Thornbury* v. *The Port of Portland,* Ore., 376 P. 2d 100; *Bowling Green-Warren County Airport Board* v. *Long,* Ky., 364 S. W. 2d 167.

IV.

49 *U.S.C.*, §1301, *Et Seq.* Does Not Deprive City of Audubon Park of Its Health and Safety Police Powers.

This statute itself, 49 *U.S.C.* §1301, *et seq.,* does not specifically vest in the F.A.A. local police powers relative to health and safety of a local unit of government. Such cannot be implied and even had the statute so provided it would run afoul of Constitutional and basic separation of governmental powers.

One of the main problems of the City of Audubon Park in connection with this litigation has been that

while the lower courts, particularly the District Court, have been cognizant that the City may have a problem they are nonetheless reluctant to inquire into it because of a general overriding welfare feeling. It has been assumed that the F.A.A. is more cognizant of adequate health, safety and welfare standards for the City of Audubon Park than the City's Board of Trustees. This is of course disputed and while it may or may not be true, none of the facts of adequacy of safeguards or necessity of the ordinance has been established in this proceeding.

Early in the oral arguments in the Circuit Court of Appeals one of the Judges stated that what the City of Audubon Park was attempting to do was to regulate air commerce. This is completely contrary to the grounds for the City's counter declaratory action. The major issue is whether or not the Board of Trustees can enact health and safety ordinances for the protection of its inhabitants. To simply assume that this City is attempting to regulate interstate commerce is begging the question. We ask that the real issues in this action be determined.

CONCLUSION.

It is believed that judgments have been entered in the lower courts without inquiry into factual issues of health and safety and that they have been entered without a complete declaration of the issues presented. It is apparent from a mere reading of the opinions in such cases as Hempstead and Cedarhurst that precautions and regulations, to protect the inhabitants in

that area are not effected in the present case. Again to go into the assumed basis of the judgments, it was stated by the District Judge that he felt monetary damage would be available but that this was an action of the Board of Trustees, or legislative body, and was a health and safety enactment. This is true, health and safety were paramount in enacting the ordinance. However, as relief as a practical matter was of the prime importance to the City, an amendment was filed raising this issue as to the City's property, *i.e.* park and roadway property. This was another issue left undecided.

It is assumed that a populace can learn to live with what is considered by them to be unsafe and unhealthy conditions but the governmental body of any such City must fulfill its obligations to its inhabitants and if it has no rights or powers in the present situation relative to judicial relief such should be clearly and unequivocally determined. It is the contention of the Petitioners that such judicial relief is not foreclosed.

Respectfully submitted,

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